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08 APR -8 PM 2:43  
RICHARD W. FRIEDL  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA  
5 SAN FRANCISCO

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7 ANDREA ESQUIVEL, et al.,

No. CV 07 5709 MHP

8 Plaintiffs,

PLAINTIFFS' OPPOSITION  
TO MOTION TO DISMISS AND  
MEMORANDUM OF POINTS  
AND AUTHORITIES

9 vs,

10 SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT, et al.,

Date: April 21, 2008

11 Defendants.

Time: 2:00 p.m.

Crtrm: 15

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ARGUMENT

FOUR MEMBERS OF THE DEFENDANT SAN FRANCISCO SCHOOL BOARD  
VOTED TO PHASE OUT THE JrROTC PROGRAM TO SATISFY THEIR  
PERSONAL, EXTREME ANTIWAR IDEOLOGY, NOT TO BENEFIT THE  
CADETS/STUDENTS

1. The Defendant San Francisco Unified School District and other  
defendants argue the case as if the federal courts' reluctance to become involved in  
local school board decisions on curriculum is absolute. It is not. All aspects of public  
high school activities must meet federal constitutional requirements.

Boards of Education...have, of course, important,  
delicate, and highly discretionary functions, but none  
that they may not perform within the limits of the Bill  
of Rights. That they are educating the young for  
citizenship is reason for scrupulous protection of  
Constitutional freedoms of the individual, if we are  
not to strangle the free mind at its source and teach  
youth to discount important principles of our  
government as mere platitudes. *West Virginia  
Board of Education v Barnette*, (1943) 319 U.S.  
624, 637.

2. The courts have said a student's right to free speech in the high school  
setting in the appropriate circumstances includes the provision of reasonably  
adequate information and ideas or the continuation of providing reasonably adequate  
information and ideas.

And we have recognized that "the State may not,  
consistently with the spirit of the First Amendment,  
contract the spectrum of available knowledge."  
*Griswold v Connecticut*, (1965) 381 U.S. 479, 482.

In keeping with this principle, we have held that in  
a variety of contexts "the Constitution protects the  
right to receive information and ideas." *Stanley v  
Georgia* (1969) 394 U.S. 557, 564

More importantly, the right to receive ideas in a  
necessary predicate to the recipient's meaningful  
exercise of his own rights of speech, press, and  
political freedom. Madison admonished us; "A

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1 popular Government, without popular information,  
2 or the means of acquiring it, is but a Prologue to a  
3 Farce or a Tragedy, or perhaps both. Knowledge  
4 will forever govern ignorance. And a people who  
5 mean to be their own Governors, must arm  
6 themselves with the power which knowledge  
7 gives." *Board of Education v Pico* (1982) 457  
8 U.S. 853, 867.

9 3. This is not a case wherein the plaintiffs requested the Defendant San  
10 Francisco Unified School Board to initiate the JrROTC program in the high schools.  
11 The JrROTC has been in these high schools for over ninety years (Pet. p 5, 9 - 10),  
12 is voluntary and 10% of the student body, 1470 students, are active in the program  
13 (Pet. p 8, 10 - 11) 100% of the seniors in the program graduate compared to 73%  
14 of the overall seniors graduate (Pet. p 10, 2- 4). In the phase out resolution passed  
15 by the Defendant San Francisco School Board was a provision to appoint a Special  
16 Task Force to during the two year phase out period to develop a substitute program  
17 as effective as the JrROTC in helping students become good citizens and good  
18 scholars. (Pet. p 17, 18 - 23; 19, 9 - 20, 2). This Special Task Force has been  
19 functioning for over a year and has come up with absolutely nothing. For the last  
20 twenty years the Defendant School Board has conducted a "special program" to  
21 motivate students to do their homework, behave themselves in class, improve their  
22 class participation, improve their grades, earn promotion to the next higher grade  
23 and graduate. This program has had little success. (Pet. p 18, 12 - 17) It is  
24 reasonable to conclude there is no program that will replace the JrROTC in its  
25 successful helping of students.

26 4. On the high school campuses where the JrROTC is functioning the  
27 students know what it does. It is the only program in the schools which overtly teach  
28 good citizenship and good scholarship and makes successful participation a  
requirement. The cadets like it. The cadets are praised and caused to be proud of

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1 being good citizens and scholars (Pet. p 6, 12 - 7, 8). The Thursday afternoon drills,  
2 conducted by the student officers brings discipline and a structured relationship  
3 among the cadets (Pet. 7, 8 - 10). The cadets are encouraged to be proud to be  
4 able to respect authority and follow instructions.

5 5. Throughout the federal court opinions the functions of the local school  
6 boards are repeatedly stated

7 We are therefore in full agreement with petitioners  
8 that local school boards must be permitted to  
9 establish and apply their curriculum in such a way  
10 as to transmit community values, and that there is  
11 a legitimate and substantial community interest in  
12 promoting respect for authority and traditional  
13 values be they social, moral or political. *Board  
14 of Education v Pico* (1982) 457 U.S. 853, 864.

15 6. The JrROTC program does all of that and more. It teaches its cadets  
16 to take pride in his/herself and in his/her appearance, it teaches self-discipline and  
17 group discipline, it inculcates pride in accomplishment and quality in achievement, it  
18 encourages each student to take primary responsibility for his/her education while  
19 being receptive and respectful to teachers in all classes and all fellow cadets, it  
20 teaches each cadet to notice the accomplishment of fellow cadets and when a fellow  
21 cadet has trouble in his/her academics to go to the fellow cadet's aid, it allows no  
22 cadet to fail, it teaches cadets to cooperate with each other and everyone, it  
23 provides structure, the cadets are taught to live and function within the structure, it  
24 teaches cadets to be honest and truthful, to not cheat on tests, to avoid alcohol and  
25 drugs, it teaches cadets to respect each other and their teachers in all classes, to  
26 address each other and all others in respectful terms, it teaches cadets to earn the  
27 respect of each other and their teachers in all classes, they are taught to do their  
28 homework, earn good grades, prepare for college and graduate with honors, to  
respect their elders, to be proud of excellence and recognize excellence in others, to

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1 respect the government, nation and the flag, it teaches reasonableness and fairness  
2 are the basis for good human relations, they are required to participate in an anti-  
3 violence program, there is no fighting, no crime, no gang affiliations, negligible  
4 discipline problems and no known disrespect for teachers, every cadet polices  
5 every other cadet and him/herself and are peacemakers among the students. The  
6 program immediately confronts deviant behavior. The JrROTC cadets regularly  
7 participate in the annual clean up on the ocean beach, they collect and contribute  
8 20% of the food to the city food bank, they have an annual toy drive, engage in  
9 graffiti removal all over the city, have a plan to help in emergency outreach notice  
10 programs, they canvass the neighborhoods to register elderly and disabled  
11 persons to contact and provide help during emergencies, they accept and provide  
12 special support and help for handicapped and special education students (Pet. 6,  
13 12 - 7, 15). This illustrative list of do's and don't's successfully "transmit(s) community  
14 values," and "promote(s) respect for authority and traditional values." These are the  
15 core purposes of a school board. The JrROTC program has been evolving for  
16 ninety years. It directly impacts the cadets and indirectly benefits the whole student  
17 body. This is not a case of the cadets not receiving the curriculum they want, it is a  
18 case of the students not receiving the curriculum they need and want, and have been  
19 receiving for ninety years. The effect the JrROTC has on the cadets benefits them  
20 in all their courses and school activities and benefits all the students in the student  
21 body. A school board should keep the best in the curriculum and build on it, not  
22 dismantle it to implement their individual extremist political agenda, especially when  
23 there is nothing to take its place. This phase out of the JrROTC can reasonably be  
24 viewed as an assault on the United States by enemy agents who have infiltrated a  
25 local school board. The United States has domestic enemies. Defendant School  
26 Board members should manage school curriculum to benefit the students not to

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1 impose their personal, political extremist enemy ideology on a minute bit of the U.S.  
2 citizenry. This violates the students free speech and their right to federal due  
3 process.

4 7. We have also acknowledged that public schools  
5 are vitally important in the preparation of individuals  
6 for participation as citizens and as vehicles for  
7 inculcating fundamental values necessary to the  
8 maintenance of a democratic political system.  
9 *Amback v Norwick* (1979) 441 U.S. 68, 76-77.

10 8. The JrROTC does not discriminate on the basis of gender, sexual  
11 orientation, race, religion or any other basis. LGBT (lesbians, gay, bisexual and  
12 transgender) students are accepted, several belong to and participate in the  
13 JrROTC program and are treated with respect and affection. The LGBT JrROTC  
14 cadets have repeatedly told members of the Defendant San Francisco School  
15 Board that they have been accepted and treated well by the program. The  
16 JrROTC program does not practice the "don't ask, don't tell" policy and expressly  
17 condemns it. (Pet. p 7, 26 - 8, 8).

18 9. In compliance with directives from the U.S. Congress and Department  
19 of Defense the JrROTC program has not and does not recruit for any military  
20 service, does not promote the military service as a career, never mentions  
21 defending the country against its enemies, and never encourages cadets to join a  
22 military service or to join the Sr.ROTC in college (Pet. p 5, 19 - 6, 2). The cadets  
23 are taught a mild and enlightened patriotism, are taught about the values of their  
24 country and once each week for two hours the cadets drill in formation wearing a neat,  
25 well tailored uniform, commanded by senior cadets who have earned promotions in  
26 rank. (Pet. p 7, 8 - 10). The JrROTC cadets and honor guard, with flags, are regular  
27 and popular features at public events in San Francisco.

28 10. Now the Defendant School Board seeks to phase out the JrROTC

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1 because it constitutes "militarism" in the schools (Pet. p 11, 1 - 9), which is an  
2 extravagant exaggeration, "recruits" for the military, which is completely untrue and to  
3 protest the "don't ask, don't tell" practice of the U.S. military (Pet. p 10, 18 - 25)  
4 which is an improper use of school board power, without any effective program to  
5 replace it. The JrROTC program is a large part of the motivational apparatus of the  
6 high schools. Successive school boards over the decades have provided the  
7 benefits of the JrROTC to the students. The present school board cannot arbitrarily,  
8 capriciously and without compelling cause take it away to impose its members'  
9 ideologically based antiwar agenda. In fact there may not be a program which  
10 combines the effective features of the JrROTC to replace it. They want to eliminate  
11 a highly successful program to the detriment of the students to satisfy their personal,  
12 hostile ideological values. Defendant School Board does not claim to have anything  
13 adequate in effectiveness to take the place of the JrROTC. There is a difference  
14 between a school board refusing to begin a JrROTC in a school system and  
15 eliminating a highly successful and effective ongoing program, without any program  
16 to take its place. Doing this will have a direct detrimental impact on a substantial  
17 portion of the student body and an indirect detrimental impact on the whole student  
18 body without any rational adequate justification merely to impose an irrelevant  
19 private agenda.

20 11. Where there are two mutually exclusive options and one is to a  
21 substantial number of students highly beneficial by providing these students with  
22 instruction, structure, information and ideas and the other option is to the same  
23 students extremely detrimental by taking from these students this same instruction,  
24 structure, information and ideas without any adequate justification, without any  
25 substitute, the student's are entitled to the beneficial option which does not "contract"  
26 the flow of information, knowledge and ideas under the freedom of speech right and

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1 due process.

2 12. This is not strictly an issue of curriculum, it is more. It is an issue of a  
3 program which promotes a noble self-vision of the complete human being to the  
4 students, provides motivation, instills pride and ambition, promotes an essential set  
5 of social values and honors success. All this is to be eliminated for pretended  
6 reasons, which are to prevent recruitment for the army, to eliminate militarism from the  
7 schools and to protest the "don't ask, don't tell" policy of the U.S. military, all of which  
8 is merely of cover to conceal the true reasons, which is to strike a blow in a global  
9 ideological struggle, which is a flagrant misuse of school board power.

10 II

11 THE DEFENDANT SAN FRANCISCO SCHOOL BOARD DOES NOT PROVIDE A  
12 BALANCED CURRICULUM FOR THE STUDENTS BY OMITTING ALL MATERIAL  
13 SUPPORTING THE NEED FOR A DEMOCRACY TO DEFEND ITSELF AGAINST  
14 FOREIGN AND DOMESTIC ENEMIES

15 13. In today's world the United States, the democracy, has foreign and  
16 domestic enemies. The issues of war and peace have gained importance with the  
17 advent of atomic weapons and the glorification of martyrdom. Global adversaries  
18 come and go and proliferate, they change in their reasons and they build their  
19 arsenals. The prohibition of the subjects of war and peace from the high school  
20 curriculum, with no useful examination of the subject by the students, leaves an  
21 enormous gap in the preparation of the student to participate competently in the  
22 democracy. The omission is intentional. The omission violates the free speech  
23 rights of the students. And this omission is an implementation of school board  
24 members' personal, ideologically based political agenda.

25 14. The issues of the world in which we live dictates the constitutionally  
26 mandated minimum subject matter content of the high school curriculum. High school  
27 curriculums are not created in a vacuum. They must address the important issues

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1 presented by the world in which the student will live. The curriculum must transmit the  
 2 values of the community, not the perverse views of a small lunatic fringe which is  
 3 unremittingly hostile to the United States.

4 ...the Court has acknowledged the importance of  
 5 the public schools "in the preparation of individuals  
 6 for participation as citizens, and in the preservation  
 of the values on which our society rests." *Ambush*  
*vs Norwick* (1979) 441 U.S. 68, 76

7 15. The application of constitutional provisions change with the evolving  
 8 world. The constitution was intended by its founders to be adequate to the changing  
 9 world. The founders certainly intended the constitution permit the survival of the  
 10 nation. Enhancing national survival is a civic virtue.

11 In a variety of academic settings the Court  
 12 therefore has acknowledged the force of the  
 13 principle that schools, like other enterprises  
 14 operated by the State, may not be run in  
 such a manner as to prescribe what shall be  
 orthodox in politics, nationalism, religion, or  
 other matters of opinion. 457 U.S. 876.

15 16. Protecting the democracy against foreign and domestic enemies is a  
 16 legitimate concern of a citizen. It is a matter about which the high schools should  
 17 provide some learning. Without such teaching the high school graduate is less  
 18 prepared, inadequately prepared, to competently participate in the democracy. The  
 19 Defendant School Board does nothing positive about this issue, Instead, it uses its  
 20 powers to stifle learning and discussion on this crucial issue and uses the book  
 21 "ADDICTED TO WAR" as the resource for U.S. history.

22 17. Every case cited and quoted by defendants is not in point. In the  
 23 Rosenberger case, the holding of the case is set forth as follows';

24 The University does acknowledge (as it must  
 25 in light of our precedents) that "ideologically  
 26 driven attempts to suppress a particular point  
 of view are presumptively unconstitutional in  
 funding, as in other contexts..." *Rosenberger*

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1 *v Rector & Visitors of Univ. of Va.* (1995) 515  
 2 U.S. 819, 831.

3 18. The vote by the four school board members who voted to phase out  
 4 the JrROTC did so to express their antiwar ideology. They seek to obliterate a  
 5 point of view from the curriculum with which they disagree and by doing so they cast  
 6 a pall of orthodoxy over the classroom. The presentation of the issues of war and  
 7 peace can be done in a variety of ways which would meet constitutional  
 8 requirements, but silence in the curriculum is not balanced constitutional presentation.

9 ...the classroom is peculiarly the marketplace of  
 10 ideas...The First Amendment therefore does  
 11 not tolerate laws that cast a pall of orthodoxy  
 12 over the classroom...free public education, if  
 13 faithful to the ideal of secular instruction and  
 14 political neutrality, will not be partisan or enemy  
 15 of any class, creed, party, or faction...that  
 16 imposition of ideological discipline was not a  
 17 proper undertaking for school authorities.  
 18 *School Board vs Pico id.* 457 U.S. 853.

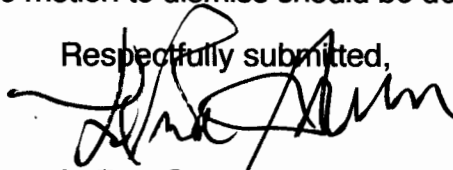
19 19. The defendant School Board seeks to make the high schools  
 20 "enclaves of totalitarianism," which is not constitutionally allowed.

21 While none of these cases define the limits  
 22 of a school board's authority to choose a  
 23 curriculum and academic materials, they are  
 24 based on the general proposition that state  
 25 operated schools may not be enclaves of  
 26 totalitarianism...In our system, students may  
 27 not be regarded as closed-circuit recipients  
 28 of only that which the State chooses to  
 communicate." *Tinker vs Des Moines School*  
*Dist.* (1969) 393 US. 503, 511.

## 22 CONCLUSION

23 For all these above reasons the motion to dismiss should be denied.

24 Respectfully submitted,



25 LeRue Grim  
 26 Attorney for Plaintiffs

27 PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

Proof of service by mail

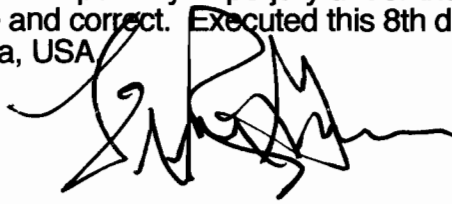
I, LeRue Grim, declare:

I am the attorney of record for all plaintiffs in the case.

On April 8, 2008, I served the attached Plaintiffs' Opposition to Motion to Dismiss and Addendum to Plaintiffs' Opposition to Motion to Dismiss and Memorandum of Points and Authorities by placing of copy of each document in an envelop, sealing it, placing it in the U.S. Mail at San Francisco, CA with sufficient postage addressed to the following:

ROBIN B. JOHANSEN, ESQ  
THOMAS A. WILLIS, ESQ  
REMCHO, JOHANSEN & PURCELL LLP  
201 Dolores Avenue  
San Leandro, CA 94577

I, LeRue Grim, declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 8th day of April, 2008 in the Northern District of California, USA



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LeRUE GRIM